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13 FIRST BANK OF DELAWARE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMBER KRISTI MARSH and STACIE EVANS,
individually and on behalf of a class of similarly situated
persons,

Plaintiffs,

v.

ZAAZOOM SOLUTIONS, LLC, a Delaware Limited
Liability Company, ZAZA PAY LLC, a Delaware
Limited Liability Company dba Discount Web Member
Sites, LLC, Unlimited Local Savings, LLC, Web Discount
Club, Web Credit Rpt. Co., MegaOnlineClub, LLC, and
RaiseMoneyForAnything; MULTIECOM, LLC, a
Colorado Limited Liability Company dba Online Discount
Membership, Web Discount Company, and Liberty
Discount Club; ONLINE RESOURCE CENTER, LLC,
a Delaware Limited Liability Company dba Web Coupon
Site, USave Coupon, and UClip; MOE TASSOUDJI, an
individual, BILL CUEVAS, an individual, FIRST
BANK OF DELAWARE, a Delaware Corporation,
FIRST NATIONAL BANK OF CENTRAL TEXAS, a
Texas Corporation; SUNFIRST BANK, a Utah
Corporation; JACK HENRY & ASSOCIATES, INC., a
Delaware Corporation dba ProfitStars; AUTOMATED
ELECTRONIC
CHECKING, INC., a Nevada Corporation; DATA
PROCESSING SYSTEMS, LLC, a Delaware Limited
Liability Company and DOES 1-10, inclusive,

Defendants.

CASE NO. 3:11-cv-05226-RS

DEFENDANT FIRST BANK
OF DELAWARE'S NOTICE
OF MOTION AND MOTION
TO STRIKE PORTIONS OF
PLAINTIFFS' SECOND
AMENDED COMPLAINT

Date: January 26, 2012
Time: 1:30 P.M.
Courtroom: 3

1 **NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF PLAINTIFFS'**
 2 **SECOND AMENDED COMPLAINT**

3 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

4 **PLEASE TAKE NOTICE THAT** on January 26, 2012 at 1:30 p.m., or as soon thereafter
 5 as this matter may be heard before the Honorable Richard Seeborg in Courtroom 3 of the above-
 6 entitled Court located at 450 Golden Gate Avenue, San Francisco, California, 94102, Defendant
 7 First Bank of Delaware (“First Bank”) will and hereby does move for an order under Federal Rule
 8 of Civil Procedure 12(f) striking certain portions of the Second Amended Complaint (the
 9 “Complaint”) of class action plaintiffs AMBER KRISTI MARSH and STACIE EVANS
 10 (“Plaintiffs”), on the ground that the items to be stricken are immaterial. First Bank asks the
 11 Court to strike the following excerpts from the Complaint:

<u>CITATION TO EXCERPT TO BE STRICKEN</u>	<u>LANGUAGE TO BE STRICKEN</u>
p.1 ¶ 2, line 27	“or in reckless disregard of the fact that”
p.2 ¶ 12, line 25	“or in reckless disregard of”
p.10, line 15	“or Recklessly Disregarded”
p.12 ¶ 85, line 1	“or reckless disregard of the truth”
p.12 ¶, line 6	“or Recklessly Disregarded”
p.13 ¶ 96, line 6	“or reckless disregard”
p.16 ¶ 122, line 13	“or recklessly disregarded”
p.16 ¶ 124, line 19-20	“or recklessly disregarded”
p.18 ¶ 132, line 18	“or acted in reckless disregard of”

1	p.21 ¶ 141, line 2	“or in reckless disregard of”
2		
3	p.22 ¶ 153, line 15	“reckless disregard of”
4		
5	p.9 ¶ 155, line 23	“reckless”
6		
7	p.12 ¶ 155, line 24	“reckless indifference”
8		
9	p.13 ¶ 167, line 8	“or in reckless disregard of”
10		
11	p.15 ¶ 178, line 18	“or in reckless disregard of”
12		
13	p. 9 ¶ 66, line 28	“depository bank accounts”
14		
15	p.11 ¶ 78, line 10	“depository bank accounts”
16		
17	p.11 ¶ 79, line 12	“depository bank accounts”
18		
19	p.12 ¶ 87, line 9	“depository bank accounts”
20		
21	p. 20 ¶ 138, lines 21-22	“depository bank accounts”
22		
23	p. 20 ¶ 139, line 26	“depository bank accounts”
24		
25	p. 22 ¶ 150, line 7	“depository bank accounts”
26		
27	p. 22 ¶ 151, line 11	“depository bank accounts”
28		
	p. 23 ¶ 164, line 28	“depository bank accounts”
	p. 24 ¶ 165, line 4	“depository bank accounts”
	p. 25 ¶ 175, line 10	“depository bank accounts”

1	p. 25 ¶ 176, line 14	“depository bank accounts”
2	p.13 ¶ 95, lines 4-5	“should have known”
3	p.26, line 24	“1. That the Court enter a judgment finding that Defendants have: a. violated California Business and Professions Code §17200; b. violated Arizona Revised Statutes §§44- 1521; c. violated 18 U.S.C. §2511; d. committed conversion; and e. committed negligence.”

This Motion is based on this Notice of Motion and Motion of First Bank, the accompanying Notice of Motion and Motion to Dismiss under Federal Rules of Civil Procedure 9 and 12(b)(6), or the alternative Motion for a More Definite Statement under Rule 12(e), each Motion's supporting Memorandum of Points and Authorities, any joinders that may be filed, the Motion to Dismiss filed by the Zaazoom Defendants and the related pleadings and papers, all pleadings and papers on file in this case, all matters of which this Court may take judicial notice, and the arguments of counsel.

Dated: December 9, 2011

DLA PIPER LLP (US)

By: /s/ Paul J. Hall
PAUL J. HALL

Attorney for Defendant
FIRST BANK OF DELAWARE

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Colorado Limited Liability Company dba Online Discount
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BANK OF DELAWARE, a Delaware Corporation,
FIRST NATIONAL BANK OF CENTRAL TEXAS, a
Texas Corporation; SUNFIRST BANK, a Utah
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 Plaintiffs filed their Second Amended Complaint (the “Complaint”) against defendant
4 First Bank of Delaware (“First Bank”) for violations of the California Unfair Competition Law,
5 Business and Profession Code section 17200, the Arizona Consumer Fraud Act, the Wiretap Act,
6 aiding and abetting conversion, and negligence on behalf of a nation-wide putative class with a
7 California Subclass. Plaintiffs make bare bones and conclusory allegations against several
8 depository banks (the “Depository Banks”), for claims that require “actual knowledge.” Casey v.
9 U.S. Bank, N.A., 127 Cal. App. 4th 1138 (2005). Allegations that First Bank acted “recklessly”
10 are to be stricken as detailed in the accompanying Notice of Motion, because they are immaterial
11 under the statutory and common law elements of each claim, impermissible under Federal Rule of
12 Civil Procedure Rule 8 and 9, and irrelevant to the Complaint.

13 Plaintiffs do not assert a Declaratory Relief cause of action, yet in their Prayer they ask the
14 court to “*enter a judgment finding* that Defendants” have violated or committed the statutory and
15 common law claims asserted. (SAC Prayer 1) (emphasis added). Because there is no stand alone
16 cause of action for declaratory relief, this portion of the Prayer is immaterial and must be stricken.

17 Similarly, Plaintiffs' repeated allegations of an unidentified "depository bank" are
18 immaterial to the Complaint and irrelevant because they fail to allege facts against First Bank
19 with any specificity. Plaintiffs must identify the actual depository bank committing each alleged
20 act.

21 Further, Plaintiffs' request for judgment based on direct violations of the WireTap Act and
22 conversion are improper because Plaintiffs allege only aiding and abetting violations by First
23 Bank. Aiding and abetting liability does not exist under the Wire Tap Act, and Plaintiffs have
24 failed to make sufficient allegations as to alleged aiding and abetting conversion.

25 Accordingly, the language cited in the Notice of Motion is immaterial and must all be
26 stricken from the Complaint under Rule 12(f) of the Federal Rules of Civil Procedure.

1 **II. LEGAL STANDARD**

2 Rule 12(f) authorizes the Court to strike “from any pleading any insufficient defense or
 3 any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). This allows
 4 the parties to “avoid the expenditure of time and money that must arise from litigating spurious
 5 issues by dispensing with those issues prior to trial.” Bureerong v. Uvawas, 922 F. Supp. 1450,
 6 1478 (C.D. Cal. 1996) (citing Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)). A
 7 motion to strike may be granted if “it is clear that the matter to be stricken could have no possible
 8 bearing on the subject matter of the litigation.” Colaprico v. Sun Microsystems, 758 F. Supp.
 9 1335, 1339 (N.D. Cal. 1991).

10 **III. ALLEGATIONS THAT FIRST BANK ACTED IN “RECKLESS DISREGARD”**

11 **ARE IMMATERIAL AND IRRELEVANT**

12 Plaintiffs’ Complaint makes only general and conclusory allegations about First Bank,
 13 asserting that First Bank participated in the alleged scheme as a depository bank to the Zaazoom
 14 Defendants *or* the Processors. Plaintiffs do not assert any direct relationship between Plaintiffs
 15 and First Bank or that First Bank knowingly processed or knowingly deposited Plaintiffs’
 16 purportedly unauthorized RCCs. Plaintiffs contend only that First Bank knew about *or* recklessly
 17 disregarded the Zaazoom Defendants’ allegedly fraudulent behavior because First Bank was *or*
 18 should have been aware of a very high rate of return on RCCs deposited at First Bank. (SAC ¶¶
 19 87-97). Plaintiffs allege that the First Bank knew *or* should have known about other defendants’
 20 alleged scheme despite the absence of any contact with Plaintiffs simply because First Bank was
 21 acting as a depository bank. Plaintiffs’ claims are fatally defective because they don’t
 22 unequivocally allege First Bank’s knowledge of the Zaazoom Defendants’ misconduct, and
 23 Plaintiffs’ “*or in reckless disregard of*” allegations are thus immaterial and should be stricken.

24 To the extent Plaintiffs’ claims against First Bank for violations of the UCL and the
 25 Arizona Consumer Fraud Act sound in fraud, Federal Rule of Civil Procedure Rule 9 requires a
 26 showing of First Bank’s knowledge of the wrongfulness and unlawfulness of the Zaazoom
 27 Defendants’ misconduct. See Brower v. AT&T Mobility, LLC, 196 Cal. App. 4th 1545, 1557
 28

(Cal. App. 2011) (holding that fraud under the UCL requires a showing of *intent* to defraud or induce reliance). In addition, Plaintiffs' claim against First Bank for aiding and abetting conversion requires a showing that (1) First Bank had actual knowledge of the specific primary wrong of the conversion allegedly committed by the Zaazoom Defendants, and (2) First Bank substantially assisted Zaazoom Defendants' alleged conversion. Casey, 127 Cal. App. 4th 1138 (requiring specific allegations of actual knowledge of the specific primary violation and substantial assistance). Casey establishes that “[k]nowledge is the crucial element.” Id. at 1144. Plaintiffs fail to allege that First Bank actually knew of the alleged misconduct by the Zaazoom Defendants *or* the Processors, or that First Bank had any legal obligation to Plaintiffs.

Without providing specific factual support, Plaintiffs allege only that First Bank acted either “knowing about or in reckless disregard of the wrongfulness and unlawfulness of the Zaazoom Defendants’ misconduct.” (SAC ¶ 145). Plaintiffs’ boilerplate allegations that First Bank acted “in reckless disregard” do not constitute facts sufficient to show actual knowledge. Casey, 127 Cal. App. 4th at 1153 (allegations that the banks knew their customers were involved in criminal or wrongful conduct are “too generic to satisfy the requirement of actual knowledge of a specific primary violation.”). Allegations that First Bank acted in “reckless disregard” of the Zaazoom Defendants’ misconduct has no bearing on the required showing of ‘knowledge’ for Plaintiffs’ claims based on privity, fraud under the UCL and the Arizona Consumer Fraud Act, or under Casey for aiding and abetting conversion, therefore, the Court should strike each and every utilization of the term “reckless” in the Complaint. Similarly, Plaintiffs’ allegation that First Bank “should have known” is also improper and must be stricken for each of these causes of action requiring intent or actual knowledge. (SAC ¶ 95).

IV. ALLEGATIONS OF AN UNIDENTIFIED “DEPOSITORY BANK” ARE IMMATERIAL TO THE COMPLAINT, IRRELEVANT, AND MISLEADING

Plaintiffs attempt to create the veneer of misconduct by First Bank, but careful inspection of the allegations against First Bank reveals only that Plaintiffs allege that the Zaazoom Defendants *or* the Processors had an untold number of depository bank accounts at various banks, one of which allegedly happened to be at First Bank. (SAC ¶¶ 10, 87, and 123). In addition to

1 the generic grouping of multiple “Depository Banks” without specifying the allegedly culpable
 2 bank, Plaintiffs reference some other unidentified ‘depository bank’ 12 separate times in the SAC.
 3 (SAC ¶¶ 66, 78, 79, 87, 138, 139, 150, 151, 164, 165, 175, and 176). Plaintiffs have named First
 4 Bank as one of three Depository Banks, and, therefore, must make specific allegations regarding
 5 alleged conduct of First Bank - not some other “depository bank” - that could hypothetically be
 6 First Bank. This flaw in the Complaint displays Plaintiffs’ attempt to mask the very attenuated
 7 and vague nature of their claims against First Bank, and fails to satisfy even the standard “notice
 8 pleading” requirements of Federal Rule of Civil Procedure Rule 8, much less the heightened
 9 pleading requirements for fraud under Federal Rule of Civil Procedure Rule 9(b).

10 **V. PLAINTIFFS’ PRAYER FOR DECLARATORY RELIEF IS UNFOUNDED AND**
 11 **UNSUPPORTED**

12 Plaintiffs do not assert a Declaratory Relief cause of action, yet in their Prayer they ask the
 13 court to “*enter a judgment finding* that Defendants” have violated or committed the statutory and
 14 common law claims asserted. (SAC Prayer 1) (emphasis added). “[I]n California pleading the
 15 prayer is not part of the complaint.” U.S. v. Fallbrook Public Utility Dist., 101 F.Supp. 298, 301
 16 (S.D. Cal 1951). A claim for Declaratory Relief is a separate and distinct cause of action. See
 17 Taylor v. U.S. Bd. Of Parole, 194 F.2d 882, 883 (D.C. Cir. 1952). Federal Rule of Civil
 18 Procedure Rule 8 requires “a short and plain statement of the claim showing that the pleader is
 19 entitled to relief.” Because there is no stand alone cause of action for declaratory relief, this
 20 portion of the Prayer is immaterial and must be stricken. Further, to the extent Plaintiffs request
 21 judgment against First Bank for direct violations of the WireTap Act and conversion, this portion
 22 of the Prayer must also be stricken because Plaintiffs allege only aiding and abetting violations.

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VI. CONCLUSION

For the foregoing reasons, First Bank respectfully requests this Court to grant its Motion to Strike certain portions of the Complaint under Federal Rule of Civil Procedure 12(f) on the grounds that the items to be stricken are immaterial and have no bearing on the subject matter of the litigation.

Dated: December 9, 2011

Respectfully submitted,

DLA PIPER LLP (US)

By: /s/ Paul J. Hall
PAUL J. HALL

Attorney for Defendant
FIRST BANK OF DELAWARE